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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1398

JOHN W. WARNER, SECRETARY OF THE NAVY,
PETITIONER

v.

JOHN W. FLEMINGS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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1. Respondent begins his argument from the same starting point as did the courts below, urging essentially that *O'Callahan* v. *Parker*, 395 U.S. 258, is entitled to retroactive effect because the decision announced a jurisdictional rule depriving military courts-martial of adjudicatory power to try non-service-connected crimes. For the reasons stated in our opening brief (pp. 11-17), we submit that the mechanical application of a "jurisdictional" label to *O'Callahan* does little to further the fundamental

inquiry presented in this case, and that the proper disposition of the retroactivity question should turn on an application of the same criteria that generally govern the decision of this question.

2. We have fully discussed in our main brief why those criteria warrant only prospective application of *O'Callahan* (pp. 18-38), and we do not repeat that discussion here. Respondent's discussion of our arguments focuses primarily on the differences between the military court-martial system prior to enactment of the Uniform Code of Military Justice in 1950 and the present system under the Code. But those shortcomings in the court-martial system of an earlier day should not, we submit, determine the effect now to be given to the rule in *O'Callahan*. That decision did not imply that either the pre-Code or the post-Code court-martial system was or is generally unfair and inadequate under the due process clause. Rather, the decision focused on two specific constitutional rights, the rights to grand jury indictment and to jury trial, and decided that, to maximize the availability of these rights, certain *kinds* of cases should not be tried by military courts. The relevant question thus is solely whether the absence of those two procedures—from pre-Code *or* post-Code military trials of "non-service-connected" offenses—has "'* * * infect[ed] the integrity of the truth-determining process at trial * * *'" by courts-martial. *Williams* v. *United States*, 401 U.S. 646, 655, n. 7, quoting *Stovall* v. *Denno*, 388 U.S. 293, 298.

Congress and the courts have apparently agreed that indictments and juries are not essential to reliable fact-finding in the military-justice system. The Uniform Code of Military Justice, while providing a number of trial protections to the accused servicemen not previously recognized in military prosecutions, imposes no statutory requirement that courts martial be tried before lay juries [1] or proceed only upon grand jury indictment.[2] Nor have the military courts, which in recent years have been particularly sensitive to protecting the rights of servicemen (see Pet. Br. 22-27), held that these two procedures are necessary for a fair disposition of the case. And, as we explained in our main brief (pp. 21-23), that also appears to be the view of this Court, as most recently reflected in its unanimous decision in *Relford* v. *Commandant*, 401 U.S. 355. In this regard, what a plurality of the Court said in *McKeiver* v. *Pennsylvania*, 403 U.S. 528, in concluding that due process does not require trial by jury in a juvenile court proceeding—despite the fact that the juvenile system has been fraught with "disappointments," "failures" and "shortcomings" (403 U.S. at 545)—is of equal relevance here (403 U.S. at 543):

> * * * [O]ne cannot say that in our legal system the jury is a necessary component of accurate factfinding. There is much to be said for it, to be sure, but we have been content to pursue

[1] Compare Art. 25, U.C.M.J., 10 U.S.C. 825.

[2] Compare Art. 32, U.C.M.J., 10 U.S.C. 832.

> other ways for determining facts. Juries are not required, and have not been, for example, in equity cases, in workmen's compensation, in probate, or in deportation cases. *Neither have they been generally used in military trials.* In *Duncan* [v. *Louisiana*, 391 U.S. 145] the Court stated, "We would not assert, however, that every criminal trial—or any particular trial—held before a judge alone is unfair or that a defendant may never be as fairly treated by a judge as he would be by a jury." 391 U.S. at 158. In *DeStefano* [v. *Woods*, 392 U.S. 631], for this reason and others, the Court refrained from retrospective application of *Duncan*, an action it surely would not have taken had it felt that the integrity of the result was seriously at issue. * * * [Emphasis added.]

3. Respondent makes the additional argument in his brief that, even if the Court should decide against him on the retroactivity issue or should conclude that the offense with which he was charged was service-connected, his court-martial conviction should be overturned because the trial was held in violation of his right to trial in the vicinage, as guaranteed by Article III, Sec. 2, cl. 3 of the Constitution (Resp. Br. 49-52).[3] This claim is based on the fact that the

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[3] Article III, Sec. 2, cl. 3 provides:

> The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not commited within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

court-martial proceeding involved here was convened at the Brooklyn Navy Yard in Brooklyn, New York, despite the fact that the alleged offense (auto theft) took place in New Jersey and respondent was apprehended by civilian authorities in Pennsylvania (see Pet. Br. 2-3).

It would be a sufficient answer to this argument to point out that respondent failed to raise any objection at his court martial on grounds of improper venue, and thus may properly be held to have waived whatever venue claim he might have had when he entered his guilty plea. See, *e.g.*, *United States* v. *Dryden*, 423 F.2d 1175, 1178 (C.A. 5), certiorari denied, 398 U.S. 950; *United States* v. *Costello*, 381 F.2d 698, 701 (C.A. 2); *United States* v. *McMaster*, 343 F.2d 176, 181 (C.A. 6), certiorari denied, 382 U.S. 818; *United States* v. *Polin*, 323 F.2d 549, 556-557 (C.A. 3); *Hanson* v. *United States*, 285 F.2d 27, 28-29 (C.A. 9); *United States* v. *Fabric Garment Co.*, 262 F.2d 631, 641 (C.A. 2), certiorari denied, 359 U.S. 989.*

In any event, respondent's Article III claim to trial in the vicinage is not well-founded. Court-martial

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*The argument was made for the first time in the present suit in the district court. That court, without passing on the question, expressed the view in dicta that respondent had "arguabl[y]" been denied the constitutional right to trial in the vicinage (Pet. App. B 53). The court of appeals (Pet. App. A7) did not reach the issue. Although the matter was not raised in our petition for certiorari or discussed in our main brief, we do not contest respondent's right to make the argument in this Court. See *Dandridge* v. *Williams*, 397 U.S. 471, 475, n. 6.

tribunals are legislative courts created by Congress under Article I of the Constitution (Art. I, Sec. 8). As such, their jurisdiction is independent of the judicial power created and defined in Article III. See *In re Vidal*, 179 U.S. 126, 127; *Dynes* v. *Hoover*, 20 How. 65, 79. As this Court stated in *Ex Parte Quirin*, 317 U.S. 1, 39:

> Presentment by a grand jury and trial by a jury of the vicinage where the crime was committed were at the time of the adoption of the Constitution familiar parts of the machinery for criminal trials in the civil courts. But they were procedures unknown to military tribunals which are not courts in the sense of the Judiciary Article * * *.

Accordingly, in the military context at least, the Constitution does not require that servicemen be tried at the locale of the crime. It has long been recognized that the "jurisdiction of general courts-martial is coextensive with the territory of the United States." Winthrop, *Military Law and Precedents* 81 (1920 War Dept. Reprint). As that noted authority observed (*ibid.*), a military tribunal "assembled at any locality within that territory may legally take cognizance of an offence committed at any *other* such locality whatever, such a court, unlike a civil tribunal, not being restricted in the exercise of its authority to the limits of a particular State or other district or region." (Emphasis in original.)

The constitutional requirement of trial in the vicinage where the offense was committed has tra-

ditionally been associated only with trials by jury. Indeed, the Sixth Amendment to the Constitution, which in this regard particularizes the general directive of Article III, provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, *by an impartial jury of the State and district wherein the crime shall have been committed*, which district shall have been previously ascertained by law * * *. [Emphasis added.]

This provision, of course, has never been thought applicable to trials by military courts.[5] The concept that the rights to jury trial and to trial in the vicinage are interrelated has its roots in early English history. See Blume, *The Place of Trial of Criminal Cases: Constitutional Vicinage and Venue*, 43 Mich. L. Rev. 59, 94 (1944); Henderson, *Courts-Martial and the Constitution: The Original Understanding*, 71 Harv. L. Rev. 293, 303-315 (1957). Those who live in the community where the crime is committed —which is frequently also the place of residence of the accused—have long been considered to be best situated to pass judgment on the validity of the charges brought. It is their "participation in the determination of guilt or innocence" (*Duncan* v.

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[5] It has long been held that " 'cases arising in the land or naval forces,' " which are expressly excepted from the operation of certain clauses of the Fifth Amendment, are also implicitly excepted from the Sixth Amendment's guarantee of trial before a jury of the vicinage. See *Ex Parte Milligan*, 4 Wall. 2, 123, 138-139. Respondent advisedly does not premise his "trial in the vicinage" argument on the Sixth Amendment.

Louisiana, 391 U.S. 145, 156) that the vicinage rule is designed to obtain.

But in the military context, an application of that rule would be of little value. Members of the armed forces have no geographical "community" in the sense conceived by the constitutional provisions attending the right to jury trial for criminal offenses in civil courts. Their "community" is, as recognized in *Orloff* v. *Willoughby*, 345 U.S. 83, 94, a "specialized" one; it consists primarily of other servicemen (and their families), who come from all parts of the nation and are constantly moving about among a variety of military installations throughout the world.

Moreover, these transient servicemen and their families have never been the ones selected to sit in judgment at a court martial. It is well settled that the guarantee of trial by jury does not apply to military tribunals. See *O'Callahan* v. *Parker*, *supra*, 395 U.S. at 272-273; *Reid* v. *Covert*, 354 U.S. 1, 37; *Ex Parte Quirin*, *supra*, 317 U.S. at 38-40; *Ex Parte Milligan*, *supra*, 4 Wall. at 123; and see *id.* at 138-139 (concurring opinion). The trial is traditionally before a panel of commissioned or warrant officers, although now a limited number of enlisted men (no more than one-third of the total panel) may, if the accused makes a timely request, serve on the court-martial, so long as they are *not* members of the same unit as the accused (Art. 25, U.C.M.J., 10 U.S.C. 825(c)(1)).

In these circumstances, the place where the military trial is held is of marginal significance to the ac-

cused. The benefit of "community participation" that is derived from the vicinage requirement in civil prosecutions is simply inapplicable in a court-martial proceeding. There is no basis, therefore, either in constitutional history or in practical necessity, for adopting respondent's novel interpretation of the vicinage clause of Article III as applicable to courts martial.

Respondent is thus in no position to claim prejudice because his court martial was convened in New York rather than in New Jersey. While he asserts (Resp. Br. 52) that his trial outside the vicinage deprived him of an opportunity to subpoena civilian witnesses from a State other than the one in which the court martial occurred, he does not dispute the fact that he made no effort to obtain the depositions of out-of-state witnesses, which he could have done under Article 68 of the Articles for the Government of the Navy (34 U.S.C. (1946 ed.) 1200).* This failure, coupled with his plea of guilty, precludes entertaining his present objection to the venue of the court martial whose judgment he is collaterally attacking. If the respondent had not pleaded guilty, the prosecution would have had to prove its case and the re-

*The claim is particularly thin on the facts of this case where the offense took place in New Jersey but the evidence that respondent suggests might have been helpful (Resp. Br. 52) related to the circumstances surrounding his arrest in Pennsylvania. Thus, had he been tried by court martial in the district of the offense, he would not have been in any substantially different posture vis-a-vis obtaining witnesses from Pennsylvania.

spondent would have been able to cross-examine these witnesses. The respondent made the decision that no proof was required when he determined to plead guilty.

CONCLUSION

For the reasons stated herein and in our main brief, it is respectfully submitted that the judgment of the court of appeals should be reversed.

ERWIN N. GRISWOLD,
Solicitor General.

HENRY E. PETERSEN,
Assistant Attorney General.

PHILIP A. LACOVARA,
Deputy Solicitor General.

WM. BRADFORD REYNOLDS,
Assistant to the Solicitor General.

ROGER A. PAULEY,
SHIRLEY BACCUS-LOBEL,
Attorneys.

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